Supreme Court, U.S.
FILED
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No. 08-_____

In The

Supreme Court of The United States

MARGUERITE SAMMANN, Individually, and as Executrix of the Estate of DR. HOWARD DAVID SAMMANN, M.D., et al.,

Petitioners,

v.

FRANCIS N. MAYER, Individually, and Louise Mayer, Individually, and as a Marital Community, et al.,

Respondents.

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

SUPPLEMENTAL APPENDIX

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App 1

UNPUBLISHED DECISION

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NADENE SAMMANN, et al..,

Plaintiffs,

v.

Estate of Elizabeth Sammann, et al..,

Defendants.

Case No. Co5-0929 L

ORDER DENYING MOTION
FOR A NEW TRIAL OR TO
AMEND THE JUDGMENT
AND FOR A STAY

(Filed on April twenty-fourth, 2006)

This matter comes before the Court on plaintiffs' "Motion for New Trial and/or in the alternative for Motion to Alter or Amend Order of Dismissal and Judgment and Motion for Stay." (Dkt. #97). By order dated February 28, 2006, the Court dismissed plaintiffs' complaint because plaintiffs purposefully and defiantly violated two orders of the Court, they engaged in litigation tactics that repeatedly and purposefully delayed resolution on the merits, and because other, less drastic sanctions were inadequate. (Dkt. #91, the "Order"). After plaintiffs filed their motion, defendants filed a motion for sanctions (Dkt. #101), then plaintiffs filed a motion for sanctions. (Dkt. #111).

As set forth below, the Court denies plaintiffs' motion for relief from the judgment and other relief and denies both parties' motions for sanctions.

I. FACTS

On February 1, 2006, the Court ordered plaintiffs to serve defendants with seven documents they erroneously filed under seal, including their proposed second amended complaint, a motion for leave to amend, and a motion for an extension of time to respond to defendants' pending dispositive motion.

Defendants had no access to the documents that plaintiffs erroneously and unilaterally filed under seal. 1 The Court ordered plaintiffs to serve defendants and file a certificate of service with the Court no later than February 8, 2006.

The Court issued a second order on February 14, 2006 noting that as of that date, plaintiffs had not served the documents or filed a certificate of service. The Court ordered plaintiffs to do so no later than February 21, 2006. "Otherwise, the Court will impose sanctions on plaintiffs, which may include dismissal of this case." (Dkt. #85 at p. 1). Plaintiffs did not comply with either order.

The Order dismissed the case "[f]or failure of the plaintiff. . . to comply with . . . any order of [the] Court." Fed. R. Civ. P. 41(b). The Court weighed the five factors set forth in Malone v. United States Postal Serv., 833 F.2d 128 (9th Cir. 1987).

1 Local Rule 5 requires that a party seeking to file a document under seal must file a motion to seal the document; the motion must include "a clear statement of the facts justifying a seal and overcoming the strong presumption in favor of public access." Local Rule 5(g)(2). Plaintiffs did not comply with that Local Rule.

The Court explained, "Plaintiffs' lengthy history of litigation with these defendants over the same issues presented in this case, their repeated attempts to delay consideration of defendants' dispositive motion, and their refusal to comply with the Court's rules and orders to serve their motion to file a second amended complaint and related documents are tactics which are designed to and have impeded the resolution of this case on the merits.." Order at p.4. The Court also found that plaintiffs' refusal to comply with the Court's order was willful.

II. DISCUSSION

A. Plaintiffs' Request for a Stay and for Relief from Judgment.

Plaintiffs seek a stay of the judgment pending their appeal pursuant to Fed. R. Civ. P. 62, which allows a party to move to stay execution of a judgment while a case is on appeal by posting a supersedeas bond. The standard for granting a stay pending appeal is effectively the same as that for issuing a preliminary injunction. See, e.g. Lopez v. Heckler, 713 F.2d 1432, 1435 (9th Cir. 1983). The Court weighs the parties' likelihood of success on the merits, the possibility of irreparable harm, the relative hardship of the parties, and the public interest.

See Nautilus Group, Inc. v. Icon Health & Fitness, Inc., 308 F. Supp. 2d 1208, 1216 (W.D. Wash. 2003). Plaintiffs have not shown a likelihood of success on the merits. They have not offered any arguments regarding the other factors. Accordingly, the Court finds that a stay is not warranted.

Plaintiffs have requested relief pursuant to Fed. R. Civ. P. 59, which applies when a party seeks a new trial. Because there was no trial in this case, that rule is inapplicable.

Although plaintiffs did not cite the rule, the Court construes their motion as one for relief from the judgment pursuant to Fed. R. Civ. P. 60. Pursuant to Fed. R. Civ. P. 60(b), a judgment may be vacated for any one of the following reasons:

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under 59(b); (3) fraud. . . misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied. . . or (6) any other reason justifying relief from the operation of the judgment.

Plaintiffs' motion does not assert that any of the specifically enumerated grounds apply. The Court therefore considers the motion under subsection 6. Fed. R. Civ. P. 60(b)(6) is an equitable remedy that should be applied only in extraordinary circumstances. See, e.g., United States v. Alpine Land & Reservoir. Co., 984 F.2d 1047, 1049-50 (9th Cir. 1993). Plaintiffs offer a series of irrelevant arguments in support of their motion, including facts related to the initial processing of their complaint and arguments in opposition to defendants' dispositive motion. None of those arguments explains plaintiffs' willful failure to comply with two of this Court's orders.

Plaintiffs also misconstrue some of the facts. For example, they allege various errors in the Court's ruling on defendants' dispositive motion; the Court, however, never ruled on that motion. See, e.g., Plaintiffs' Motion at p. 13 ("This Court also abused its discretion by ruling against our securities claims using a statute of limitations defense that was clearly invalid"). Furthermore, the Court found that dismissal was the appropriate sanction in part because plaintiffs had "repeatedly and purposefully delayed resolution on the merits." Order at p. 3. The Court noted that plaintiffs repeatedly sought continuances of defendants' pending dispositive

motion in part to conduct discovery, yet they never sought any discovery. Plaintiffs now argue that they failed to conduct discovery because defense counsel served a notice of unavailability for December 12-19, 2005. Plaintiffs' claim that they failed to conduct any discovery during the three months the dispositive motion was pending because of counsel's one-week unavailability is untenable.

Plaintiffs also argue that they did not comply with the Court's orders because the Court erroneously ordered them to serve all defendants, including the proposed new defendants who were the subject of plaintiffs' motion to amend and proposed amended complaint. The Court's orders are devoid of any such instruction. Because the Court never granted plaintiffs' motion to amend, the proposed new parties were not defendants. Moreover, despite the fact that plaintiffs filed numerous motions challenging the Court's orders in various ways, they never expressed any confusion or disagreement about which defendants to serve. These facts undermine their newly presented excuse for failing to serve defendants as required by the Court's orders and rules.

Plaintiffs also argue that the Court erred in ordering them to serve defendants with their motions, proposed amended complaint, and the other docu-

ments they erroneously filed under seal and refused to serve. Plaintiffs' disagreements with the Court's prior orders have been raised and rejected in prior motions and do not constitute "extraordinary circumstances justifying relief from the judgment." Although plaintiffs have disputed their obligation to serve their proposed second amended complaint, they have no plausible basis to refuse to serve the other erroneously sealed documents, including their motion for an extension. For all of these reasons, plaintiffs' motion for relief from the judgment and other relief is denied.

Finally, plaintiffs request that the Court permit them to amend their complaint. In their motion, however, they acknowledge that "Rule 15 is inapplicable unless a party obtains relief under Rule 59 or Rule 60." Plaintiffs' Motion at p. 19. Because plaintiffs' motion for relief from judgment is denied, their request to amend their complaint is denied.

B. Defendants' Request for Sanctions.

Defendants request sanctions against plaintiffs "for continuing a pattern of frivolous motions which the defendant believes is intended to harass and cause delay." Defendants' Opposition at p. 2. Defendants request sanctions pursuant to Fed. R. Civ. P. 11; however , the request does not meet the requirements of Fed. R. Civ. P. 11(c)(1)(A).

Furthermore, as plaintiffs correctly point out, defendants cannot recover their costs or attorneys' fees as the prevailing party because they did not file a timely motion for that relief. Local Rule 54(d)(1); Fed. R. Civ. P. 54(d).

The Court also has inherent authority to sanction any party pursuant to General Rule 3. Although the Court has found that plaintiffs willfully violated two Court orders and engaged in improper litigation tactics, the Court has already imposed the drastic sanction of dismissal. Therefore, the Court will not impose monetary sanctions on plaintiffs at this time. However, if plaintiffs engage in further litigation misconduct, including filing frivolous motions, the Court may reconsider the imposition of sanctions.

C. Plaintiffs' Request for Sanctions

Plaintiffs request sanctions against defendants, arguing that they incurred additional service costs because defense counsel Alan Funk("Mr. Funk") did not provide them or the Court with his current address. Plaintiffs state that they attempted to serve documents on Mr. Funk on Friday, March 31, 2006, but when they arrived at his law office at 4:45 p.m., the receptionist had left for the day. Plaintiffs quest-

ioned attorneys from other firms about Mr. Funk's whereabouts, and those unnamed attorneys informed them that Mr. Funk was no longer a tenant in the building. At the advice of a postal worker, plaintiffs subsequently mailed their documents to Mr. Funk via certified mail and asked for "Address Service Requested." Certificate Regarding Service (Dkt. #109) at p. 4. Plaintiffs request sanctions in the amount of $500.00 " for the trouble and expense [they] had to go thru, and $45.96 for costs of service." Declaration of Nadene Sammann (Dkt. #111) at p. 3. After plaintiff incurred those costs, Mr. Funk's colleague, J. Stephen Funk, informed plaintiffs that Mr. Funk was no longer representing defendants.

If plaintiffs' allegations are true and Mr. Funk no longer represents defendants, then he is required to follow the procedures to withdraw set forth in General Rule 2(g)(4)(A). His failure to follow those procedures, however, did not cause the "effort" and expense plaintiffs incurred. Even if plaintiffs believed that Mr. Funk no longer represented defendants, they could have served his co-counsel, J. Stephen Funk. Furthermore, pursuant to Fed. R. Civ. P. 5(b), plaintiffs could have left the documents at defense counsel's office " in a conspicuous place" or mailed them to their address in the record. Rather than following the procedures set forth in the rules, plaintiffs took it upon themselves to attempt to

investigate Mr. Funk's new address and serve him there. Any additional effort and expense appear to be the result of plaintiffs' own actions, so sanctions are not warranted.

In their reply memorandum, plaintiffs also request sanctions based on defendants' counsel request to withdraw. The Court will address the motion to withdraw and plaintiffs' request for sanctions on that basis by separate order.

III. CONCLUSION

Accordingly, the Court DENIES plaintiffs' motion for a new trial and other relief (Dkt. #97), DENIES defendants' motion for sanctions (Dkt. #101), and DENIES plaintiffs' motion for sanctions. (Dkt. #111).

DATED this 24th day of April, 2006.

/s/ Robert S. Lasnik
United States District Judge

UNPUBLISHED DECISION

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON STATE
AT SEATTLE

NADENE SAMMANN, *et al.*,

Plaintiffs,

v.

Estate of Elizabeth Sammann,
et al.,

Defendants.

Case No. CO5-0929 L

ORDER OF DISMISSAL

(Filed February twenty-eight, 2006)

This matter comes before the Court *sua sponte* based on plaintiffs' unexplained refusal to comply with two orders of this Court.

On February 1, 2006, the Court ordered plaintiffs to serve defendants with seven documents they erroneously filed under seal, included[sic] their proposed second amended complaint, a motion for leave to amend, and a motion for an extension of time to respond to defendants' pending dispositive motion. Defendants had no access to the documents that plaintiffs erroneously and unilaterally filed under seal. The Court ordered plaintiffs to serve defendants and file a certificate of service with the Court no later than February 8, 2006.

The Court issued a second order on February 14, 2006 noting that as of that date, plaintiffs had not served the documents or filed a certificate of service. The Court ordered plantiffs to do so no later than February 21, 2006.. "Otherwise, the Court will impose sanctions on plaintiffs, which may include dismissal of this case." (Dkt. # 85 at p. 1). Plaintiffs have not complied with either order. Furthermore, they have offered no explanation or excuse for their failure to do so.

A court may dismiss a case "[f]or failure of the plaintiff. . . to comply with. . any order of [the] court." Fed. R. Civ. P. 41(b). A court's decision to dismiss for

failure to comply with its orders is governed by the five factors set forth in Malone v. United States Postal Serv., 833 F.2d 128 (9th Cir. 1987). The Court considers: " (1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions." Id. at 130. The first two factors support dismissal of this case. Plaintiffs dilatory conduct has impeded the resolution of this case. Defendants cannot address the merits, or lack thereof, of plaintiffs' proposed amended complaint and motion for leave to file it without copies of those documents. Although plaintiffs have disputed their obligation to serve their proposed second amended complaint, 1

1 Plaintiffs argued that they should not be required to serve their proposed second amended complaint because it contains allegations under the False Claims Act ("FCA"), 31 U.S.C. Sec 3729 *et seq.* Although plaintiffs are correct that a FCA complaint must remain under seal for at least 60 days pursuant to the statute, plaintiffs did not file this case under the FCA. Instead, after defendants filed their dispositive motion, plaintiffs sought leave to amend their complaint to add a new FCA claim. In that context, the Court found that permitting the amendments without granting the defendants an opportunity to respond to the motion to amend would be fundamentally unfair.

they have no plausible basis to refuse to serve the other erroneously sealed documents, including their motion for an extension. Plaintiffs' refusal to comply with this Court's orders has also prejudiced defendants by delaying their ability to resolve the matter.

The Court also considers the public's interest. Plaintiffs' proposed amended complaint contains FCA claims, albeit ones that appear frivolous. Although public policy favors resolution on the merits, plaintiffs have repeatedly and purposefully delayed resolution on the merits. Plaintiffs have pursued litigation against defendants since 1994, when they filed suit against them in state court. The Superior Court dismissed their claims on a motion for summary judgment and imposed sanctions pursuant to Rule 11 for "[f]iling this untimely lawsuit in November 1994, and continuing to pursue it for more than 6 years thereafter." (Dkt. #29). Defendants filed a dispositive motion in this Court based on improper venue, lack of jurisdiction, res judicata, collateral estoppel, statute of limitations, and failure to state a claim (defendants' motion"). Plaintiffs have repeatedly delayed consideration of that motion, noted for December 9, 2005. They requested an extension of time of more than two months to work on their filings

and to obtain a generation skipping trust document through discovery. The Court granted the request and renoted the motion for February 10, 2006. As the deadline for filing their response to defendants' motion approached, plaintiffs filed a motion to amend their complaint to add a FCA claim. Plaintiffs also filed a motion for a 91-day extension of time to respond to defendants' motion based on their assertion that the proposed amended complaint had to be sealed for 60 days pursuant to the FCA. The Court denied the request for an extension because plaintiffs had not served the motion on defendants.

On February 6, 2006, the date their response was due, plaintiffs filed two motions requesting extensions of time to respond to defendants' motion. The Court granted a one-week extension. Plaintiffs filed a fourth request for an extension on February 17, 2006, requesting an additional thirty-day extension to obtain two documents, including the generation skipping trust. Plaintiffs, however, did not explain their failure to obtain the documents earlier or to propound any discovery requests during the pendency of the case.

Plaintiffs' lengthy history of litigation with these defendants over the same issues presented in this case, their repeated attempts to delay consideration of defendants' dispositive motion, and their refusal to comply with the Court's rules and orders to serve their motion to file a second amended complaint and related documents are tactics which are designed to and have impeded the resolution of this case on the merits . 2

The Court has also considered less drastic sanctions and found them inadequate. The Superior Court imposed Rule 11 sanctions on plaintiffs, and the Washington State Court of Appeals awarded attorney's fees for filing a frivolous appeal. (Dkt.#29). Nevertheless, plaintiffs filed the same claims against defendants in this Court. When plaintiffs failed to comply with this Court's February 1, 2006 order, the Court warned plaintiffs that failure to comply would result in the imposition of sanctions, including dismissal. See, e.g., Malone, 833 F.2d at 132(noting that alternate sanctions include a warning). Plaintiffs

2 It appears that defendants' pending dispositive motion would be granted because plaintiffs' claims are barred by the statute of limitations and the doctrines of res judicata and collateral estoppel.

were given ample time to comply, and have filed other, unrelated documents in the interim. These facts, and the fact that plaintiffs have stridently disagreed with the Court's order, indicate that their refusal to comply is willful. 3 As in Malone, plaintiffs have "purposefully and defiantly violated a court order," warranting the sanction of dismissal. Id.

Accordingly, this case is DISMISSED. The Clerk of the Court is directed to enter judgment in favor of defendants and against plaintiffs.

DATED this 28th day of February, 2006.

/s/ Robert S. Lasnik
United States District Judge

3 Plaintiffs filed a motion for reconsideration of the order, and a motion to stay the order pending resolution of the motion for reconsideration. (Dkt. ## 76, 80).